



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 12, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0446

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112512.

The Texas Department of Health (the "department") received a request for information related to Columbia Homecare of Pasadena ("Columbia"), a home and community support services agency licensed by the department. You assert that certain marked portions of the requested documents are excepted from required public disclosure pursuant to sections 552.101 of the Government Code in conjunction with various statutory provisions, as well as under section 552.102 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

You note that you did not submit your request for a decision to this office within ten business days of receiving the request for information. Chapter 552 of the Government Code imposes a duty on a governmental body seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten business days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

In accordance with sections 552.301 and 552.302, the information at issue is presumed public. However, section 552.101 protects information that is confidential by law. Because the presumption of openness is overcome by a showing that information is confidential by law, we must consider your section 552.101 claim.

Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Portions of the requested information consist of reports about the home health agency's compliance with federal law as a Medicare provider. Federal regulations require the department to release the HCFA form 2567, statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. As the reports are signed by a provider representative and the "provider's plan of correction" portion of the report appears to contain the provider's comments to the report, we believe the provider has had a reasonable opportunity to review and comment on the report. Accordingly, you must release these reports, but with deletions of information that identify the persons specified in the regulation. In this regard, we note you have included a roster sheet of patients and personnel. You indicate that the enumerated patients and personnel correspond to the numbered patients referenced in the HCFA 2567 statements of deficiencies. Thus, their identities must be withheld. The remaining information in these reports must be released in accordance with federal regulations.

Columbia appears to be a home health agency certified by the department. *See* Health and Safety Code §§ 142.001(11) (defining "home health service"), 142.002 (licensing of home health, hospice, or personal assistance service providers). Section 142.009(d) provides as follows:

(d) the reports, records, and working papers used or developed in an investigation¹ made under this section are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or

¹An "investigation" is defined as "an inspection or survey conducted by a representative of the department to determine if a licensee is in compliance with this chapter." Health & Safety Code § 142.001(18).

(5) on a form developed by the department that identifies deficiencies found without identifying a person, other than the home and community support services agency.

The submitted state forms fall within the scope of section 142.009(d)(5) and, therefore, are not confidential under that section. However, we must consider whether any of the information contained in these forms is made confidential by the common-law right to privacy or the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b.

Information is excepted from disclosure under section 552.101 of the Government Code, in conjunction with the common-law right to privacy, if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You also raise section 552.102, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together.

This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987).

Having carefully reviewed the information in the state form, we find that none of it is excepted from disclosure under common-law privacy.²

Section 5.08 of the MPA provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

²Although some of the information contained in the submitted records may implicate the privacy rights of certain individuals, the identities of these individuals are contained on the rosters which we conclude may be withheld under federal regulations. *See* 42 C.F.R. §§ 401.126, .133.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

V.T.C.S. art. 4495b, § 5.08. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. Thus, access to medical records is not governed by chapter 552 of the Government Code, but rather the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. See V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991). We have marked the information on the state form that is subject to the MPA. The department may only release this information in accordance with the MPA.

Section 611.002(a) of the Health and Safety Code makes communications between a patient and a professional and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional confidential. Section 611.004(d) provides that "[a] person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information." Upon review of the information contained in the state form, we conclude that none of this information may be withheld pursuant to section 611.002 of the Health and Safety Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 112512

Enclosures: Marked documents

cc: Mr. Charles Ham
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(w/o enclosures)